



STATE OF WASHINGTON

BOARD OF INDUSTRIAL INSURANCE APPEALS

2430 Chandler Court SW PO Box 42401 • Olympia, Washington 98504-2401 • (360) 753-6823

June 2, 2004

NOTICE OF PROPOSED RULEMAKING

The Board has filed a notice of proposed rulemaking to amend its rules of practice and procedure, WAC 263-12. A copy of the proposal may be viewed on our website at www.bjia.wa.gov. You may request a copy by calling Donalda at (360) 753-6823 x183.

Many of the proposed changes are housekeeping in nature. There are also new rules regarding expedited hearings for provider suspension petitions and filing an electronic notice of appeal. Changes involving new procedures include:

WAC 263-12-01501
WAC 263-12-020
WAC 263-12-050
WAC 263-12-117
WAC 263-12-106

A public hearing on the proposed rule changes is scheduled at the Board offices in Olympia at 11:00 a.m. on Tuesday, June 22, 2004 (2430 Chandler Ct. S.W.), Main Conference Room. Written comments should be submitted by that date to:

David E. Threedy, Executive Secretary
Board of Industrial Insurance Appeals
P O Box 42401
Olympia WA 98504-2401

Any questions concerning the proposed rules should also be directed to David E. Threedy (360) 753-6823 or e-mail to threedy@bjia.wa.gov.



**PROPOSED RULE MAKING
(RCW 34.05.320)**

CR-102 (7/10/97)
**Do NOT use for expedited
adoption**

Agency: **Board of Industrial Insurance Appeals**

- ☐ Preproposal Statement of Inquiry was filed as WSR _____; or
☐ Expedited Adoption -- Proposed Rule Making notice was filed as WSR _____; or
☒ Proposal is exempt under RCW 34.05.310(4).

- ☒ Original Notice
☐ Supplemental Notice
to WSR _____
☐ Continuance of WSR _____

(a) Title of rule: (Describe Subject)

Chapter 263-12, Practice & Procedure before the Board of Industrial Insurance Appeals

Purpose: To revise the Board's rules of practice and procedure by amending WAC(s) 263-12-01501, 263-12-020, 263-12-050, 263-12-117; and adding one new section, WAC 263-12-106.

Other identifying information:

(b) Statutory authority for adoption: RCW 51.52.020

Statute being implemented:

(c) Summary:

See attached summary

Reasons supporting proposal:

See attached

(d) Name of Agency Personnel Responsible for:

Office Location

Telephone

1. Drafting.....	David E. Threedy	2430 Chandler Ct SW, Olympia WA	(360)753-6823
2. Implementation....	David E. Threedy	2430 Chandler Ct SW, Olympia WA	(360)753-6823
3. Enforcement.....	David E. Threedy	2430 Chandler Ct SW, Olympia WA	(360)753-6823

(e) Name of proponent (person or organization):

Board of Industrial Insurance Appeals

- ☐ Private
☐ Public
☒ Governmental

(f) Agency comments or recommendations, if any, as to statutory language, implementation, enforcement and fiscal matters:

N/A

(g) Is rule necessary because of:

Federal Law?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No	If yes, ATTACH COPY OF TEXT Citation:
Federal Court Decision?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No	
State Court Decision?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No	

(h) HEARING LOCATION:

**Board of Industrial Insurance Appeals
Main Conference Room
2430 Chandler Ct SW
Olympia, WA**

Date: June 22, 2004 Time: 11:00 a.m.

Assistance for persons with disabilities: Contact

Donalda Ball by June 10, 2004

TDD (____) _____ or (360) 753-6823 x183

NAME (TYPE OR PRINT)

David E. Threedy

SIGNATURE

TITLE

Executive Secretary

DATE

5/19/04

Submit written comments to:

**David E. Threedy
PO Box 42401
Olympia WA 98504-2401**

FAX (360) 586-5611 By (date) 6/21/04

DATE OF INTENDED ADOPTION: **6/23/04**

CODE REVISER USE ONLY

(j) Short explanation of rule, its purpose, and anticipated effects:

See attached

Does proposal change existing rules? ☒ YES

☐ NO

If yes, describe changes:

See purpose, summary and short explanation of rule, its purpose and anticipated effects.

(k) Has a small business economic impact statement been prepared under chapter 19.85 RCW?

☐ Yes. Attach copy of small business economic impact statement.
A copy of the statement may be obtained by writing to:

telephoning: ()
faxing: ()

☒ No. Explain why no statement was prepared

There is no impact on financial issues in the amendments being made. They are basically clarification of procedural rules relating to administrative hearings.

(l) Does section 201, chapter 403, Laws of 1995, apply to this rule adoption? ☐ Yes

☒ No

Please explain:

These rule changes are not legislative; they relate to procedures related to agency hearings or clarify language of a rule without changing its effect.

(c) Summary

The proposed revisions make a number of housekeeping changes by clarifying and simplifying language and punctuation; clarifying provisions pertaining to electronic filing of a notice of appeal; clarifying the authority of legal interns to participate in appeals; clarification to reflect that various public employee death benefit appeals are also filed with the Board; and clarifying provisions related to the taking of evidence in perpetuation depositions. Creates a new section, WAC 263-12-106, regarding expedited hearings (required due to the passage of SSB 6428, ch. 259, Laws of 2004).

Reasons for supporting proposal:

Rules are being modified to meet the clear writing mandates; new section is due to the passage of SSB 6428).

(j) Short explanation of rule, its purpose, and anticipated effects:

WAC 263-12-01501 The rule includes a new subsection pertaining to the electronic filing of a notice of appeal. The primary importance of this rule is to give the parties notice that even though filed electronically, if it is filed after the Board's customary business hours, it will not be considered as filed until the next day.

WAC 263-12-020 Inclusion of a new subsection to cover the authority of legal interns (Rule 9 interns) to participate in appeals.

WAC 263-12-050 Because we do not adhere to the current requirements in the rule regarding what is required in a notice of appeal, the mandatory language was removed. In addition, subsection (5) was changed to reflect that various public employee death benefit appeals are also filed with the Board.

WAC 263-12-117 A clause was inserted to clarify that for perpetuation depositions, provisions related to the taking of evidence at hearing would also apply.

NEW SECTION — WAC 263-12-106

A new section regarding expedited hearings is required due to the passage of SSB 6428, ch. 259, Laws of 2004. The rule indicates that the industrial appeals judge will receive all testimony and evidence, and then refer the matter directly to the Board for decision.

AMENDATORY SECTION (Amending WSR 98-20-109, filed 10/7/98, effective 11/7/98)

WAC 263-12-01501 Communications and filing with the board. (1)
Communications with the board.

(a) **Where to file.** All written communications by parties pertaining to a particular case, including notices of appeal, applications, notices of appearance, briefs, memoranda, motions, requests, or petitions for review, shall be filed with the board at its headquarters in Olympia, Washington.

(b) **Methods of filing.** Unless otherwise provided by statute or these rules any written communication may be filed with the board personally, by mail, or by telephone facsimile.

(i) **Filing personally.** The filing of a written communication with the board personally is perfected by delivering the written communication to an employee of the board at the board's headquarters in Olympia during customary office hours.

(ii) **Filing by mail.** The filing of a written communication with the board is perfected by mail when the written communication is deposited in the United States mail, properly addressed to the board's headquarters in Olympia and with postage prepaid. Where a statute or rule imposes a time limitation for filing the written communication, the party filing the same should include a certification demonstrating the date filing was perfected as provided under this subsection. Unless evidence is presented to the contrary, the date of the United States postal service postmark shall be presumed to be the date the written communication was mailed to the board.

(iii) **Filing by telephone facsimile.**

(A) The filing of a written communication with the board by telephone facsimile is perfected when a legible copy of the written communication is reproduced on the board's telephone facsimile equipment in Olympia. The hours of operation of the board's telephone facsimile equipment are 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding legal holidays. If a transmission of a written communication commences after these hours of operation the written communication shall be deemed filed on the next succeeding business day.

(B) Any written communication filed with the board by telephone facsimile should be preceded by a cover page identifying the party making the transmission, listing the address, telephone and telephone facsimile number of such party, referencing the appeal to which the written communication relates, and indicating the date of, and the total number of pages included in, such transmission.

(C) No written communication should exceed fifteen pages in length, exclusive of the cover page required by this rule.

(D) The party attempting to file the written communication by telephone facsimile bears the risk that the written communication will not be legibly printed on the board's telephone facsimile equipment due to error in the operation or failure of the equipment being utilized by either the party or the board.

(E) The board may require a party to file an original of any document previously filed by telephone facsimile.

(iv) Electronic filing of a notice of appeal. A notice of appeal may be filed electronically when using the appropriate form for electronic filing of appeals as provided on the board's internet site. An electronic notice of appeal is filed when it is received by the Board's designated computer during the Board's customary office hours pursuant to WAC 263-12-015. Otherwise the notice of appeal is considered filed at the beginning of the next business day. The board shall issue confirmation to the filing party that an electronic notice of appeal has been received. The board may reject a notice of appeal that fails to comply with the board's filing requirements. The board must notify the filing party of the rejection.

(c) Sending written communication. All correspondence or written communication filed with the board pertaining to a particular case, before the entry of a proposed decision and order, should be sent to the attention of the industrial appeals judge assigned to the case. Interlocutory appeals should be sent to the attention of the chief industrial appeals judge. In all other instances, written communications shall be directed to the executive secretary of the board.

(d) Form requirements. Any written communications with the board concerning an appeal should reference the docket number which was assigned by the board to the appeal, if known. Copies of any written communications filed with the board shall be furnished to all other parties or their representatives of record, and the original shall demonstrate compliance with this requirement. All written communications with the board shall be on paper 8 1/2" x 11" in size.

AMENDATORY SECTION (Amending WSR 00-23-021, filed 11/7/00, effective 12/8/00)

WAC 263-12-020 Appearances of parties before the board. (1) Who may appear.

(a) Any party to any appeal may appear before the board at any conference or hearing held in such appeal, either on the party's own behalf or by an attorney at law or other authorized lay representative of the party's choosing as prescribed by section 3 below.

(b) Appeals under the Washington Industrial Safety and Health Act.

(i) In an appeal by an employee or employee representative under the Washington Industrial Safety and Health Act, the cited employer may enter an appearance as prescribed in subsection (2) below and will be deemed a party to the appeal.

(ii) In an appeal by an employer, under the Washington Industrial Safety and Health Act, an employee or employee representative may enter an appearance as prescribed in subsection (2) below, and will be deemed a party to the appeal.

(c) Where the party appears representing himself or herself, he or she may be

accompanied, both at conference and at hearing, by a lay person of his or her choosing who shall be permitted to accompany the party into the conference or hearing room and with whom he or she can confer during such procedures.

(d) Although the industrial appeals judge may not advocate for either party, all parties who appear either at conferences or hearings are entitled to the assistance of the industrial appeals judge presiding over the proceeding. Such assistance shall be given in a fair and impartial manner consistent with the industrial appeals judge's responsibilities to the end that all parties are informed of the procedure which is to be followed and the issues which are involved in the proceedings. Any party who appears representing himself or herself shall be advised by the industrial appeals judge of the burden of proof required to establish a right to the relief being sought.

(2) How to make an appearance.

(a) Appearances shall be made either by:

(i) Filing a written notice of appearance with the board containing the name of the party to be represented, and the name and address of the representative; or by

(ii) Appearing at the time and place of a conference or hearing on the appeal, and notifying the industrial appeals judge of the party to be represented, and the name and address of the representative.

(b) The appearing party shall furnish copies of every written notice of appearance to all other parties or their representatives of record at the time the original notice is filed with the board.

(c) The board shall serve all notices and orders on each representative and each party represented. Service upon the representative shall constitute service upon the party. Where more than one individual associated with a firm, or organization, including the office of the attorney general, has made an appearance, service under this subsection shall be satisfied by serving the individual who filed the notice of appeal, or who last filed a written notice of appearance or, if no notice of appeal or written notice of appearance has been filed on behalf of the party, the individual who last appeared at any proceeding concerning the appeal.

(3) Lay representation. Duly authorized lay representatives may be permitted to appear in proceedings before the board without a formal request for admission to practice before the board so long as the lay representative does not charge a fee and is not otherwise compensated for the representation except as provided below:

(a) A worker or beneficiary may be represented by a person employed by the worker's labor union whose duties include handling industrial insurance matters for the union. Lay persons may not represent workers before the board in return for remuneration received from the worker or from the worker's receipt of benefits under this act.

(b) An employer may be represented by an employee. An employer may also be represented by a firm or firms that contracts with the employer to handle matters

pertaining to industrial insurance without regard to whether a fee is charged.

(c) In appeals involving the Washington Industrial Safety and Health Act under chapter 49.17 RCW and assessments under chapter 51.48 RCW, an employer may be represented by a lay person without regard to whether a fee is charged.

(d) Paralegals supervised by an attorney licensed in the state of Washington to practice law may represent any party (~~(appealing)~~) appearing before the board.

(e) Legal interns granted a limited license to engage in the practice of law pursuant to Admission to Practice Rule 9 of the Washington Court Rules (APR) may participate in proceedings to the same extent as permitted by APR 9(c)(5) with regard to courts of limited jurisdiction.

(4) **Withdrawal or substitution of representatives.** An attorney or other representative withdrawing from a case shall immediately notify the board and all parties of record in writing. The notice of withdrawal shall comply with the rules applicable to notices of withdrawal filed with the superior court in civil cases. Withdrawal shall be subject to approval by the industrial appeals judge or the executive secretary. Any substitution of an attorney or representative shall be accomplished by written notification to the board and to all parties of record together with the written consent of the prior attorney or representative. If such consent cannot be obtained, a written statement of the reason therefor shall be supplied.

(5) **Conduct.** All persons appearing as counsel or representatives in proceedings before the board or before its industrial appeals judges shall conform to the standards of ethical conduct required of attorneys before the courts of the state of Washington.

(a) Industrial appeals judge. If any such person does not conform to such standard, the industrial appeals judge presiding over the appeal, at his or her discretion and depending on all the circumstances, may take the following action:

(i) Admonish or reprimand such person, or

(ii) Exclude such person from further participation in the proceedings and adjourn the same, or

(iii) Certify the facts to the appropriate superior court for contempt proceedings as provided in RCW 51.52.100, or

(iv) Report the matter to the board.

(b) The board. In its discretion, either upon referral by an industrial appeals judge as stated above or on its own motion, after information comes to light that establishes to the board a question regarding a persons ethical conduct and fitness to practice before the board, and after notice and hearing, may take appropriate disciplinary action including, but not limited to:

(i) A letter of reprimand,

(ii) Refusal to permit such person to appear in a representative capacity in any proceeding before the board or its industrial Appeals judges, or

(iii) Certification of the record to the superior court for contempt proceedings as provided in RCW 51.52.100. If the circumstances require, the board may take action as described above prior to notice and hearing if the conduct or fitness of the person appearing before the Board requires immediate action in order to preserve the orderly disposition of the appeal or appeals.

(c) Proceedings. If any person in proceedings before the board disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered so to do, any pertinent book, paper or document, or refuses to appear after having been subpoenaed, or upon appearing refuses to take oath as a witness, or after having the oath refuses to be examined according to law, the industrial appeals judge may, at his or her discretion and depending on all the circumstances:

(i) Admonish or reprimand such person, or

(ii) Exclude such person from further participation in the proceedings and adjourn the same, or

(iii) Certify the facts to the appropriate superior court for contempt proceedings as provided in RCW 51.52.100, or

(iv) Report the matter to the board for action consistent with (b) above.

AMENDATORY SECTION (Amending WSR 03-02-038, filed 12/24/02, effective 1/24/03)

WAC 263-12-050 Contents of notice of appeal. The board's jurisdiction shall be invoked by filing a written notice of appeal.

(1) **General Rule.** In all appeals, the notice of appeal (~~shall~~) should contain where applicable:

(a) The name and address of the appealing party and of the party's representative, if any;

(b) A statement identifying the date and content of the department order, decision or award being appealed. This requirement may be satisfied by attaching a copy of the order, decision or award;

(c) The reason why the appealing party considers such order, decision or award to be unjust or unlawful;

(d) A statement of facts in full detail in support of each stated reason;

(e) The specific nature and extent of the relief sought;

(f) The place, most convenient to the appealing party and that party's witnesses, where board proceedings are requested to be held;

(g) A statement that the person signing the notice of appeal has read it and that to the best of his or her knowledge the contents are true;

(h) The signature of the appealing party or the party's representative.

(2) **Industrial Insurance Appeals.** In appeals arising under the Industrial Insurance Act (Title 51 RCW), the notice of appeal (~~shall~~) should also contain:

(a) The name and address of the injured worker;

(b) The name and address of the worker's employer at the time the injury occurred;

(c) In the case of occupational disease, the name and address of all employers in whose employment the worker was allegedly exposed to conditions that gave rise to the occupational disease;

(d) The nature of the injury or occupational disease;

(e) The time when and the place where the injury occurred or the occupational disease arose.

(3) **Crime Victims' Compensation Act.** In appeals arising under the Crime Victims' Compensation Act (chapter 7.68 RCW), the notice of appeal (~~shall~~) should also contain:

(a) The time when and the place where the criminal act occurred;

(b) The name and address of the alleged perpetrator of the crime; and

(c) The nature of the injury.

(4) **Assessment Appeals.** In appeals from a notice of assessment arising under chapter 51.48 RCW or in cases arising from an assessment under the Worker and Community Right to Know Act (chapter 49.70 RCW), the notice of appeal (~~shall~~) should also contain:

(a) A statement setting forth with particularity the reason for the appeal; and

(b) The amounts, if any, that the party admits are due.

(5) **LEOFF and Public Employee Death Benefit Appeals.** In appeals arising under the special death benefit provision of the Law Enforcement Officers' and Fire Fighters' Retirement System (chapter 41.26 RCW), the notice of appeal (~~shall~~) should also contain:

(a) The time when and the place where the death occurred; and

(b) The name and address of the decedent's employer at the time the injury occurred.

(6) **Asbestos Certification Appeals.** In appeals arising under chapter 49.26 RCW concerning the denial, suspension or revocation of certificates involving asbestos projects, the notice of appeal (~~shall~~) should also contain:

(a) A statement identifying the certification decision appealed from;

(b) The reason why the appealing party considers such certification decision to be incorrect.

(7) **WISHA Appeals.** In appeals arising under the Washington Industrial Safety and Health Act (chapter 49.17 RCW), the appeal (~~shall~~) should also contain:

(a) A statement identifying the citation, penalty assessment, or notice of abatement date appealed from;

(b) The name and address of the representative of any labor union representing any employee who was or who may be affected by the alleged safety violation(s);

(c) A statement certifying compliance with WAC 263-12-059.

(8) **Other Safety Appeals.** In appeals arising under chapter 49.22 RCW concerning alleged violations of safety procedures in late night retail establishments, chapter 70.74 RCW concerning alleged violations of the Washington State Explosives Act, or chapter 88.04 RCW concerning alleged violations of the Charter Boat Safety Act, the notice of appeal (~~shall~~) should also contain:

(a) A statement identifying the citation, penalty assessment, or notice of abatement date appealed from;

(b) The name and address of the representative of any labor union representing any employee who was or who may be affected by the alleged safety violation or violations;

(c) If applicable, a statement certifying compliance with WAC 263-12-059.

AMENDATORY SECTION (Amending WSR 03-02-038, filed 12/24/02, effective 1/24/03)

WAC 263-12-117 Perpetuation depositions. (1) Evidence by deposition. The industrial appeals judge may permit or require the perpetuation of testimony by deposition(~~(-)~~) , subject to the applicable provisions of WAC 263-12-115. Such ruling may only be given after the industrial appeals judge gives due consideration to: (a) The complexity of the issues raised by the appeal; (b) The desirability of having the witness's testimony presented at a hearing; (c) The costs incurred by the parties in complying with the ruling; and (d) The fairness to the parties in complying with the ruling. The industrial appeals judge may require that depositions be taken and published within prescribed time limits, which time limits may be extended by the industrial appeals judge for good cause. Each party shall

bear its own costs except when appropriate and requested by a party, the industrial appeals judge may allocate costs to parties or their representatives. If the deposition is not transcribed in a reproducible format it may be excluded from the record.

(2) **Procedure at deposition.** Unless the parties stipulate or the industrial appeals judge determines otherwise all depositions permitted to be taken for the perpetuation of testimony shall be taken subject to the following conditions: (a) That all motions and objections, whether to form or otherwise, shall be raised at the time of the deposition and if not raised at such time shall be deemed waived; (b) that all exhibits shall be marked and identified at the time of the deposition and, if offered into evidence, appended to the deposition; (c) that the deposition be published without necessity of further conference or hearing at the time it is received by the industrial appeals judge; (d) that all motions, including offers to admit exhibits and objections raised at the time of the deposition, shall be ruled upon by the industrial appeals judge in the proposed decision and order; and (e) that the deposition may be appended to the record as part of the transcript, and not as an exhibit, without the necessity of being re-typed into the record.

NEW SECTION

WAC 263-12-106. Expedited Hearings. If a statute requires that the board conduct an expedited hearing in a matter, the matter will be referred to a duly authorized industrial appeals judge. Notices of conferences and hearings related to the expedited hearing will conform to the requirements identified in WAC 263-12-090 and WAC 263-12-100. After hearing all testimony and receiving all evidence related to the expedited hearing, the industrial appeals judge will refer the matter directly to the board for decision. The board will issue an order based on the record of the expedited hearing.